

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. A-12/09-683  
 )  
Appeal of )

INTRODUCTION

The Petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) reducing the variances granted for transportation and shopping, two Instrumental Activities of Daily Living (IADLs) under the Choices for Care (CFC) program.

The decision incorporates the prior history of petitioner's interactions with DAIL including Fair Hearing No. 20,798. A fair hearing was held on March 25, 2010. DAIL presented testimony from B.S., a Long-Term Clinical Care Coordinator (LTCCC). Petitioner testified and presented testimony from M.S., her case manager from the local area agency on aging. The decision is based upon the evidence adduced at hearing.

Procedural History

The CFC program provides personal care services for both Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs). When the program started, DAIL

provided up to 330 minutes/week for IADLs.<sup>1</sup> Based on a legislative change, DAIL now provides up to 270 minutes/week for IADLs. The IADLs of meal preparation and medication management are treated separately. Recipients can ask for a variance to obtain additional time for IADLs.

Petitioner received and receives variances for her IADLs. Fair Hearing No. 20,798 dealt, in part, with a proposed reduction of petitioner's IADLs for the 2006-2007 service year. The decision found, in part, that petitioner was entitled to a continuation of the variance for 605 minutes/week for IADLs. Those IADLs included variances for 180 minutes/week for shopping and 160 minutes/week for transportation. That decision dealt, in part, with petitioner's request for additional time for shopping and transportation above the amount of previous grants. DAIL's denial of the request for an increase was affirmed.

This hearing deals with the 2009-2010 service year. DAIL granted petitioner her requests for her ADLs, meal preparation, medication management, and incontinence care. DAIL reduced the amount of IADLs from 605 minutes/week to 330

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<sup>1</sup> Covered IADLs include money management, phone, household maintenance, light housekeeping, laundry, shopping, transportation, and equipment management.

minutes/week. Petitioner appealed in sufficient time to receive continuing benefits pending decision.

FINDINGS OF FACT

1. The petitioner is a forty-three-year-old woman who became a paraplegic as a result of a car accident approximately fifteen years ago. She has a T12 vertebrae injury. Petitioner has no use of her legs. She suffers from chronic pain and is prescribed methadone and dilaudid for pain management. In addition, petitioner has a neurogenic bladder, rotator cuff injuries to both shoulders, carpal tunnel syndrome in both wrists, asthma and depression. During the past year, petitioner was hospitalized in January 2009 due to sepsis from a perforated bladder. She returned home in February 2009 for three weeks and was hospitalized again until late April 2009 due to malnourishment.

2. Petitioner lives in a mobile home with her boyfriend on the Islands. Her boyfriend is one of her personal care attendants (PCA). Petitioner is dependent on her PCAs for transportation to medical appointments and shopping. Due to her pain, she finds it difficult to travel for several purposes.

3. There is no grocery store on the Islands.

Petitioner receives 3SquaresVt (food stamps) because she is low income. Petitioner uses the Price Chopper in South Burlington for grocery shopping because they double food coupons and she can stretch her food stamps further. Even so, petitioner finds that her food stamps do not always last the entire month. The closest grocery store is in Milton but that store does not double food coupons. The petitioner has found that grocery store too expensive. Petitioner has used the Price Chopper for several years.

4. Petitioner uses eleven medications per day. Two of her medications for pain are methadone and dilaudid. Both of these medications are narcotics subject to controls.

The pharmacy on the Islands does not carry either of these two medications. Petitioner uses pharmacies in Milton or nearby for these medications. To access these medications, petitioner needs to pick up the prescription from her doctor and then call the pharmacy to see if they have a supply. She receives a prescription for a ten to fourteen day supply. She is usually not able to fill these prescriptions the same day she receives them, necessitating a separate trip to the pharmacy.

Petitioner can fill her other prescriptions once/month at her local pharmacy.

5. Petitioner's doctors are in Chittenden County. Her general practitioner wants to see petitioner once per month. Her urologist wants to see petitioner approximately every six weeks. Petitioner's PCAs transport her to appointments, transfer petitioner into and out of the car, and do transfers for petitioner in the doctor's offices onto the examining table.

6. Past variance for IADLs have incorporated 180 minutes/week for shopping and 160 minutes/week for transportation.

7. M.S. is petitioner's case manager. She has worked with petitioner since 2004 including helping petitioner complete the forms for her annual reassessments for CFC services.

8. M.S. met with petitioner for five hours to complete the CFC reassessment for the 2009-2010 service year. The reassessment form is the ILA (Independent Living Assessment). According to M.S., petitioner's needs have remained constant.

M.S. requested a variance for both shopping and transportation. In all, petitioner requested an overall increase of her IADLs to 818 minutes/week.

Shopping. M.S. requested an additional 303 minutes/week for shopping. The request included 170 minutes/week for grocery shopping at the Price Chopper in South Burlington (45 minutes to the store, 60 minutes to shop, 45 minutes to return home, and 20 minutes to put groceries away. M.S. included 38 minutes/week representing the weekly average for the once monthly trip to Wal-Mart for household essentials (150 minutes comprised of 45 minutes to the store, 60 minutes shopping and 45 minutes to return home). M.S. included 95 minutes to pick up medications every other week. M.S. noted that there was ordinarily a two day gap between petitioner getting the prescription for pain medications and being able to fill the prescription.

Transportation. M.S. requested a variance of an additional 240 minutes/week noting that the petitioner averages two appointments per week for and that the PCA assists the petitioner in and out of the car as well as assisting the petitioner on and off the examining table.

9. B.S., the LTCCC, reviewed the petitioner's ILA. She has reviewed petitioner's case since 2005. She did a paper review and did not contact M.S. or petitioner with questions.

B.S. denied the variance for shopping finding that shopping is included in the IADL maximums. She allowed a 90 minute variance for transportation to shopping due to petitioner location. She assumed that transportation to medical appointments would be covered by Medicaid transportation although she is not conversant with the Medicaid transportation regulations nor did she check this out. She also found that the time the PCA spent assisting the petitioner at medical appointments should be included in companion time.

At hearing, B.S. said that she looked at where the closest grocery store and pharmacy were located and that she thought the amount of trips seemed excessive.<sup>2</sup> She considered others with similar needs. She considered that the Legislature reduced the amount of IADLs.

10. DAIL issued a decision on December 23, 2009 that petitioner's service plan was not approved as requested. Petitioner filed her request for fair hearing on December 29, 2009. The Commissioner upheld DAIL's decision on March 18,

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<sup>2</sup>At hearing, B.S. brought in a print out of petitioner's Medicaid history. She had this prepared for hearing. The information was not used as part of her decision. Petitioner receives both Medicare and Medicaid so that a Medicaid printout of medical services is an incomplete picture. No weight is given to this information as part of this decision.

2010 finding the DAIL's assessment of time was appropriate. A fair hearing was held on March 25, 2010.

11. Fair Hearing No. 20,798 made findings supporting the variances for 180 minutes/week for shopping and 160 minutes/week for transportation. Those findings are consistent with the findings herein.

ORDER

DAIL's decision to reduce petitioner's IADLs to 330 minutes/week is reversed. Petitioner's IADLs of 605 minutes/week is reinstated.

REASONS

The Choices for Care (CFC) program is a Medicaid waiver program authorized under Section 1115(a) of the Social Security Act. The CFC program allows individuals needing nursing home care the option of remaining in the community.

In particular, the general policy of the CFC program is "based on person-centered planning and shall be designed to ensure quality and protect the health and welfare of the individuals receiving services." CFC 1115 Long-term Care Medicaid Waiver Regulations (CFC Reg.) II(A). Each case turns on the facts specific to the individual under consideration.



The CFC program pays for personal care attendants who help individuals with their ADLs and IADLs. Each person receives an individualized assessment to determine the amount of services he/she needs. In terms of both ADLs and IADLs, there are program maximums. However, DAIL recognized that certain individuals need services in excess of the maximum time limits and allows individuals to apply for variances. CFC Reg. XI.

Petitioner has been a CFC participant since 2005. Petitioner received a variance for shopping and transportation from DAIL. Over the past three years, petitioner received a total of 605 minutes/week for her IADLs as a result of the variance approvals for shopping and transportation.

DAIL proposes terminating the variance for shopping, reducing the variance for transportation, and reducing petitioner's IADLs to 330 minutes/week.

When DAIL decides to reduce or terminate a variance, DAIL bears the burden of proof in justifying the reduction of services. Fair Hearing Rule No. 1000.3(0)(4).

In terms of shopping and transportation, petitioner's needs remain constant over time. Petitioner lives in a rural county with limited resources. She needs to travel for

grocery shopping, to pick up and fill prescriptions for her narcotic pain killers, and to see her doctors.

As a low-income Vermonter, petitioner cannot be faulted for travelling to a grocery store where she can stretch her food stamps because the store doubles coupons. Given her condition, proper nutrition is important (as can be seen for her hospitalization last year for malnourishment). This issue was considered in Fair Hearing No. 20,798 in which petitioner's request for variance included travelling to the same grocery store for the same reasons; that variance was upheld.

DAIL made certain assumptions regarding Medicaid transportation. Medicaid can cover the cost of transportation to a medical provider provided transportation is not otherwise available to the person. W.A.M. § 7408(B). The Department for Children and Families contracts with providers who must adhere to certain policies. Those policies spell out situations in which transportation is not otherwise available. Household including members who can drive the recipient are not considered eligible. Under the DCF regulations and policies, DAIL's assumption cannot stand. Petitioner has a vehicle. Her boyfriend can drive her as well as her other PCAs.

The evidence does not support a reduction to the variances to the IADLs. DAIL has not met their burden of proof.

The petitioner raises a second issue. She asked for an increase to the variances she had for shopping and transportation. When an individual seeks an increase to a variance, the burden shifts to the individual to show he/she meets the criteria for the variance.

Petitioner has not done so in this case. Petitioner's needs regarding shopping and transportation have been consistent over time.

Based on the foregoing, DAIL's decision to terminate the variance for shopping and reduce the variance for transportation to 90 minutes is reversed. The previous variances for IADLs should remain in place at 605 minutes/week. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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